

PARALLEL PROCEEDINGS AND INVESTIGATIVE TOOLS

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(Adapted from an outline prepared by
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WHAT?

- Criminal
- Civil
- Administrative
 - ▶ Suspension/debarment/exclusion
 - ▶ Consumer protection
 - ▶ Environmental concerns
 - ▶ Safety & health concerns
 - ▶ Tax
 - ▶ SEC
- State & local government

WHY?

Sanctioned by the Courts

“In the absence of substantial prejudice to the rights of the parties involved . . . parallel proceedings are unobjectionable under our jurisprudence.”

“[W]e should not block parallel investigations . . . in the absence of ‘special circumstances’ in which the nature of the proceedings demonstrably prejudices substantial rights of the investigated party or of the government.”

SEC v. Dresser Indus., Inc., 628 F.2d 1368 (D.C. Cir. 1980) (*en banc*)

WHY?

Advantages

- More effective
 - Full remedies (civil, criminal, administrative)
 - More likely to result in systemic improvements
- More efficient
 - Investigate while evidence is fresh
 - Avoid duplication of effort
 - Res judicata, collateral estoppel
 - Global resolution

WHY?

- To avoid problems
 - ▶ Statute of limitations
 - ▶ Asset dissipation
 - ▶ Misuse of discovery
 - ▶ Grand jury abuse
 - ▶ Brady/Giglio/Jencks issues
 - ▶ Res judicata, collateral estoppel
 - ▶ Usurping authority
 - ▶ Double jeopardy and excess fines issues

WHEN?

- Early & often
- DOJ Policy
 - ▶ Criminal referral, indictment, declination
 - Timely assessment of civil & administrative potential
 - ▶ Civil referral, complaint, qui tam action
 - Timely assessment of criminal potential
 - ▶ Timely communication with agency, including suspension/debarment/exclusion officials
 - ▶ Timely communication with state & local authorities

HOW?

Four Stages:

1. Referral/qui tam filing
2. Investigation
3. Litigation
4. Resolution

REFERRAL/QUI TAM

- Parallel proceeding procedure
- Referral to DOJ/USAO (criminal or civil) is deemed a referral for all purposes
 - 1934 Comptroller General's Opinion
- Criminal/civil/administrative/state & local authorities

INVESTIGATION

Tools

- Grand jury subpoena
- CIDs
- Search warrant
- Consensual monitoring
- Administrative search/warrant
- Contractual access
- Voluntary

GRAND JURY

Fed. R. Crim. P. 6(e)(2)

“A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph 3(A)(ii) of this subdivision shall not disclose *matters occurring before the grand jury*, except as otherwise provided for in these rules.”

GRAND JURY

Why So Secret?

- Prevent escape of targets & subjects
- Prevent subornation of perjury & witness tampering
- Encourage full disclosure by witnesses
- Insure freedom of deliberation
- Protect innocent persons under investigation
- *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211 (1979)

PRIOR TO GRAND JURY

- Memorialize discussions
- Segregate information
- Identify information by source & receipt date
- Investigators should not be made “agents of the grand jury”

GRAND JURY

“Matters Occurring Before the Grand Jury”

- Law depends on jurisdiction
- In general, any information which would reveal the “identities of witnesses or jurors, the substance of testimony, the strategy or direction of the investigation, the deliberations or questions of the jurors, and the like.”
 - *Fund for Constitutional Gov’t v. Nat’l Archives & Records Serv.*, 656 F.2d 856 (D.C. Cir. 1981)

GRAND JURY

“Matters Occurring Before the Grand Jury”

- Testimony
- Witness names
- Reports & memoranda
 - Depends on how closely related to GJ investigation
 - Likelihood of revealing targets/subjects, witnesses, and direction of the GJ investigation
- Auditor's analyses of books & records
 - In at least one case, analysis cloaked by secrecy even though only results were presented to GJ

GRAND JURY

“Matters Occurring Before the Grand Jury”

- Documents

- ▶ Effect Test: whether information would reveal some secret aspect of the inner workings of the GJ
 - “[W]hen testimony is sought for its own sake--for its intrinsic value in furtherance of a lawful investigation--rather than to learn what took place before the grand jury, it is not a valid defense to disclosure that the same documents had been , or were presently being, examined by the grand jury.”

United States v. Interstate Dress Carriers, 280 F.2d 52 (2d Cir. 1960)

GRAND JURY

“Matters Occurring Before the Grand Jury”

- Documents (cont’d)
 - ▶ Rebuttable Presumption: documents originally prepared for other purposes (e.g., business records) are presumed to be ‘matters occurring before the grand jury’; however, that presumption may be rebutted “by demonstrating that the documents are public or were not obtained by coercive means or that discovery would not otherwise be available by civil discovery and would not reveal the nature, scope, or direction of the grand jury inquiry.”
 - *FDIC v. Ernst & Whinny*, 921 F.2d 83 (6th Cir. 1990)

GRAND JURY

NOT Matters Occurring Before the Grand Jury

- Matters obtained from an independent source
- Matters disclosed in criminal proceeding (i.e., matters of public record)
- Witness may disclose his/her testimony
- Statements concerning possibility of indictment (but not basis)

GRAND JURY

What Constitutes Disclosure

- Disclosure to Government's civil attorneys
 - *United States v. Sells Engineering*, 463 U.S. 418 (1983) (civil attorneys for the Government not entitled to automatic disclosure under Rule 6(e)(3)(A)(I))
 - *United States v. John Doe, Inc. I*, 481 U.S. 102 (1987) (DOJ Antitrust Division attorneys properly obtained 6(e) order to disclose information to Civil Division attorneys)
- Disclosure to self; disclosure in complaint
 - *United States v. John Doe, Inc. I* (1987) (attorney who participated in GJ investigation could consider grand jury material and file complaint, as long as complaint did not refer to what occurred in the GJ.)

GRAND JURY

What Constitutes Disclosure

- Transmittal to Another Court
 - - *In re Sealed Case*, 250 F.3d 764 (D.C. Cir. 2001)
(transmission of grand jury documents to a judge in another district was an unauthorized disclosure) Derivative use
- Media leaks
 - *Barry v. United States*, 865 F.2d 1317 (D.C. Cir. 1989) (upon a showing of probable cause, court must conduct a show cause hearing)

GRAND JURY

Authorized Disclosures

- Without court order
 - ▶ An attorney for the government for use in the performance of such attorney's duty--Rule 6(e)(3)(A)(I)
 - *United States v. Sells Engineering*, 463 U.S. 418 (1980) (Government's civil attorneys not “attorney[s] for the government”)
 - ▶ Such government personnel as are necessary to assist an attorney in the performance of such attorney's duty --Rule 6(e)(3)(A)(ii)
 - ▶ Another grand jury--Rule 6(e)(3)(C)(iii)

GRAND JURY

Authorized Disclosures

- With court order
 - ▶ “[W]hen so directed by a court preliminarily to or in connection with a judicial proceeding”--Rule 6(e)(3)(C)(I)
 - ▶ Grounds & considerations regarding disclosure to the Government’s civil attorneys
 - Purpose to determine whether to proceed with civil action
 - To save time & \$\$\$ for Government, defendants, & witnesses
 - Diminished need for secrecy
 - GJ terminated
 - “[W]here . . . the grand jury investigation is ongoing, the need for secrecy will be difficult to overcome by a litigant seeking grand jury materials.” *FDIC v. Ernst & Whinny*, 921 F.2d 83 (6th Cir. 1990)
 - Defendants informed
 - Matters aired in criminal proceeding

GRAND JURY

Tips for Rule 6(e) Motion

- Don't forget to include DOJ officials, staff attorney, and support staff for appropriate assistance, review, and authorizations concerning the matter
- Focused request
 - ▶ Describe documents with particularity
 - ▶ NEVER, EVER ask for “what the GJ has”
 - ▶ Affidavit under seal
 - ▶ Have criminal attorney file

GRAND JURY

- Sanctions for unauthorized disclosure
 - ▶ Contempt
 - ▶ Equitable relief/injunction
 - ▶ Professional reprimand
 - ▶ Court order for investigation by DOJ Office of Professional Responsibility
- No private right of action

INTERVIEWS & NOTETAKING

- Brady
 - ▶ Obligation to disclose evidence “favorable to an accused” and “material to either guilt or punishment”
 - *Brady v. Maryland*, 373 U.S. 83 (1963)
- Giglio
 - ▶ Obligation to disclose information “that might be used to impeach credibility of government witnesses when the reliability of the witness could be determinative of guilt or innocence”
 - *Giglio v. United States*, 405 U.S. 150 (1972)
- Kyles
 - ▶ Prosecutor has “personal duty” to learn of and disclose “material, exculpatory information”
 - ▶ Extends to “information known to others acting on the government’s behalf, including police”
 - *Kyles v. Whitely*, 514 U.S. 419 (1995)

INTERVIEWS & NOTETAKING

- Jencks Act, 18 USC § 3500
 - ▶ Duty to disclose witness “statements” on request in a criminal proceeding

INTERVIEWS & NOTETAKING

- Notes can give rise to obligations in the criminal case
 - ▶ No requirement to take notes
 - ▶ No notes may look suspicious
 - ▶ Who should take notes?
 - One agent
 - Two or more note takers creates possibility that notes may differ; if material, then Brady may apply
 - Agent has duty to preserve original notes
 - ▶ When notes = Jencks Act material
 - To be a witness “statement,” must be “signed or otherwise approved,” or a substantially verbatim record
 - Therefore, use your own
 - Don’t read back or ask witness to confirm notes (better to re-ask question)
 - Witness’ notes may be Jencks material

LITIGATION

- Timing

- ▶ Why should criminal go first?
 - Discovery
 - Brady/Giglio/Jencks
 - 5th Amendment
 - Collateral estoppel
 - Conviction, guilty plea, nolo plea
 - Acquittal not an estoppel
- ▶ Exceptions
 - Qui tam actions
 - Statute of limitations
 - Dissipation of assets
 - Need to enjoin activity which threatens public health or safety

LITIGATION

- Timing (cont'd)
 - ▶ Dealing with exceptions
 - Statute of limitations: tolling agreements
 - Qui tam actions
 - Extensions of the seal
 - Stay of civil proceedings

LITIGATION

Stay of Civil Proceedings

- Discretionary

- ▶ Balancing test, interests of justice
 - ▶ (1) private interests & prejudice to the plaintiff
 - ▶ (e.g., dissipation of assets, witnesses disappear, memories fade)
 - ▶ (2) private interests & prejudice to the defendant
 - ▶ (e.g., 5th Amendment, diverts limited resources, witnesses disappear, memories fade)
 - ▶ (3) convenience to the courts (i.e., clearing docket)
 - ▶ (4) interests of outside parties
 - ▶ (5) public interest

- Procedure

- ▶ Motion & Affidavit

LITIGATION

- Timing (cont'd)
 - ▶ “[T]he strongest case for deferring civil proceedings . . . is where a party under indictment for a serious offense is required to defend a civil or administrative action involving the same matter.”
 - ▶ In such a case, “[i]f delay of the noncriminal proceeding would not seriously injure the public interest, a court may be justified in deferring it.”
- *SEC v. Dresser Indus., Inc.* (D.C. Cir. 1980) (*en banc*)

LITIGATION

Alternatives to Staying Proceeding

- Protective order (e.g., postponing discovery)
- Confidentiality agreement
- Amending civil pleadings (e.g., to remove 5th Amendment answer)
- Stay of deposition
- Other limits on discovery
- Grant immunity (criminal decision)
- Cold comfort letter

DOUBLE JEOPARDY

No “person [shall] be subject for the same offence to be twice put in jeopardy of life or limb” Fifth Amendment

- *Hudson v. United States*, 522 U.S. 93 (1997)
 - ▶ Double Jeopardy Clause protects only against the imposition of multiple *criminal* punishments
 - ▶ Civil or criminal nature of punishment is a question of statutory construction
 - ▶ “[O]nly the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.”
- *United States v. Lippert*, 148 F.3d 974 (8th Cir. 1998)
 - ▶ Applying *Hudson*, 8th Cir. holds that Anti-Kickback Act unequivocally imposes a civil penalty; therefore, Double Jeopardy Clause does not apply
 - ▶ Reasoning would apply equally to FCA

EXCESSIVE FINES

“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

Eighth Amendment

- Imposition of large civil penalty *may* implicate Excessive Fines Clause
- Unclear if corporations are protected by Clause
 - *Browning-Ferris of Vermont v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989)
- *United States v. Bajakajian*, 524 U.S. 321 (1998)
 - Sets forth standards
- *United States v. Lippert*, 148 F.3d 974 (8th Cir. 1998)
 - Applying *Bajakajian*, 8th Cir. is uncertain whether Excessive Fines Clause applies to Anti-Kickback Act, but holds penalty in the case at bar not excessive.

INVESTIGATIVE TOOLS

IG SUBPOENA

Requirements

- May be used for civil, criminal, or joint investigation
 - *Donovan v. Spadea*, 757 F.2d 74 (3d Cir. 1985)
- Audit/investigation must be within IG's authority
- Information must be reasonably relevant to inquiry
 - Minimally relevant
 - IG's interpretation given great weight
 - Financial records from 3d party--must give notice to subject
- Subpoena must be reasonable in scope
 - Not overbroad
 - Not overly burdensome

IG SUBPOENA

Defenses

- Irrelevant
- Overbroad
- Overly burdensome
- Sought for improper purpose (e.g., to obtain information for agency, apart from IG's function)
- IG acting under the direction and control of DOJ/USAO
 - Recommendation v. direction
 - Cooperation is OK

CIVIL INVESTIGATIVE DEMANDS (CIDs)

31 U.S.C. § 3733

- Documents, Deposition testimony, written answers to interrogatories
- Subject must certify compliance
- Limits
 - ▶ Scope--relevant to investigation
 - ▶ Custodian cannot share with unauthorized personnel
 - ▶ May be used in court or administrative proceeding

SEARCH WARRANT

Fed. R. Crim. P. 41

- Criminal
- Consult agent & criminal attorney

VOLUNTARY ACCESS

Never Overlook the Obvious

- Interviews
- Documents
- Partial lifting of the seal

THE END